READINGS FOR CLASS #1 — FEDERALISM

1. A National, But Limited, Judicial Power Is Proposed and Ratified: Article III of the U.S. Constitution

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

2. Some Proponents of the New Constitution Note Limits on Judicial Power: The Federalist No. 81 (A. Hamilton)

* * * * Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation. [¶] It is inherent in the nature of sovereignty not to be amenable to

the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable. * * * *

3. The Supreme Court Entertains a Private Creditor's Suit Against a Debtor State: Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)

[Alexander Chisholm, a citizen of South Carolina, brought an action in assumpsit against the State of Georgia in the United States Supreme Court. Plaintiff was the executor of the estate of Robert Farquhar, also of South Carolina, who had allegedly supplied war material to Georgia during the Revolution. Georgia never paid Farquhar. In the Supreme Court, Georgia refused to appear for oral argument and instead filed a written remonstrance challenging the Supreme Court's authority to proceed. Five Justices heard the case, four sided with the plaintiff. At this stage of the Court's history, there was no attempt at an opinion of the Court; each Justice delivered a separate opinion. The opinion of Justice Iredell (who cast the only vote in Georgia's favor) was announced first. The other opinions have been reordered.]

IREDELL, *Justice:*— * * * * I shall * * * confine myself, as much as possible, to the particular question before the Court, though every thing I have to say upon it will effect every kind of suit, the object of which is to compel the payment of money by a State. The question * * * is, will an action of assumpsit lie against a State? If it will, it must be in virtue of the Constitution of the United States, and of some law of Congress conformable thereto. * * * *

The Constitution * * * provides for the jurisdiction wherein a State is a party, in the following instances:—1st. Controversies between two or more States. 2nd. Controversies between a State and citizens of another State. 3rd. Controversies between a State, and foreign States, citizens, or subjects. And it also provides, that in all cases in which a State shall be a party, the Supreme Court shall have

original jurisdiction. The words of the general judicial act, conveying the authority of the Supreme Court, under the Constitution, so far as they concern this question, are as follows:—Sect. 13. "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also, between a State and citizens of other States, or aliens, in which latter case it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all jurisdiction of suits or proceedings against Ambassadors, or other public Ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by Ambassadors, or other public Ministers, or in which a Consul, or Vice-Consul, shall be a party." * * * *

I conceive, that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only. This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority. * * * * If it shall be found on this occasion, or on any other, that the remedies now in being are defective, for any purpose it is [Congress'] duty to provide for, they no doubt will provide others. It is their duty to legislate so far as is necessary to carry the Constitution into effect. It is ours only to judge. * * * * If therefore, this Court is to be (as I consider it) the organ of the Constitution and the law, not of the Constitution only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular * * *.

But the act of Congress has not been altogether silent upon this subject. The 14th sect. of the judicial act, provides in the following words: "All the before mentioned Courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." * * * * From this it is plain that the Legislature did not choose to leave to our own discretion the path to justice, but has prescribed one of its own. In doing so, it has, I think, wisely, referred us to principles and usages of law already well known, and by their precision calculated to guard against that innovating spirit of Courts of Justice * * * *. I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed. * * * *

The only principles of law, then, that can be regarded, are those common to all the States. I know of none such, which can affect this case, but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work of the laws in every State in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the

country. * * * * No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown.

Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. * * * * The [Federal] Judicial power is of a peculiar kind. It is indeed commensurate with the ordinary Legislative and Executive powers of the general government, and the Power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the United States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States under the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. * * * *

[L]ooking at the act of Congress, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted) we can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed. If therefore, no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution * * * an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here; If it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the Constitution, as to the power of Congress to authorize such a one.

Now I presume it will not be denied, that in every State in the Union, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in England apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this Constitution could, in any manner, or upon any colour apply to the case of a claim against a State in its own Courts, where it was solely and completely sovereign in respect to such cases at least. * * * * The only remedy in a case like that before the Court, by which, by any possibility, a suit can be maintained against the crown in England * * * I believe is that which is called a petition of

right. * * * * [Among other English authorities, Justice Iredell discussed *Hargrave's Case of the Bankers*, in which a group of bankers successfully petitioned the court of exchequer to recover on a debt owed by King Charles II. Justice Iredell pointed out, however, that the King had assigned the bankers particular sums from a particular revenue stream and, apparently unlike any other English court, the court of exchequer possessed express authority over revenues. He acknowledged a variety of procedures in English petition cases.] But in all cases of petition of right, of whatever nature is the demand, I think it is clear beyond all doubt, that there must be some indorsement or order of the King himself to warrant any further proceedings. The remedy, in the language of Blackstone, being a matter of grace, and not on compulsion. * * * * [Furthermore, it] never was pretended, even in the case of the crown in England, that if any contract was made with Parliament, or with the crown by virtue of an authority from Parliament, that a Petition to the crown would in such case lie. * * * *

Suppose * * * it should be objected, that the reasoning I have now used is not conclusive, because, inasmuch as a State is made subject to the judicial power of Congress, its sovereignty must not stand in the way of the proper exercise of that power * * *. I answer, 1st. That this construction can only be allowed, at the utmost, upon the supposition that the judicial authority of the United States, as it respects States, cannot be effectuated, without proceeding against them in that light: a position I by no means admit. 2nd. That according to the principles I have supported in this argument, admitting that States ought to be so considered for that purpose, an act of the Legislature is necessary to give effect to such a construction, unless the old doctrine concerning corporations will naturally apply to this particular case. 3rd. That as it is evident the act of Congress has not made any special provision in this case, grounded on any such construction, so it is to my mind perfectly clear that we have no authority, upon any supposed analogy between the two cases, to apply the common doctrine concerning [municipal] corporations, to the important case now before the Court. * * * *

[And unlike such corporations, a] State does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: The voluntary and deliberate choice of the people. * * * * A State, though subject in certain specified particulars to the authority of the Government of the United States, is in every other respect totally independent upon it. The people of the State created, the people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the Republican form. * * * * If still it should be insisted, that though a State cannot be considered upon the same footing as the municipal corporations I have been considering, yet, as relative to the powers of the General Government it must be deemed in some measure dependent; admitting that to be the case (which to be sure is, so far as the necessary execution of the powers of the General Government extends) yet in whatever character this may place a State, this can only afford a reason for a new law, calculated to effectuate the powers of the General Government in this new

case: But it affords no reason whatever for the Court admitting a new action to fit a case, to which no old ones apply, when the application of law, not the making of it, is the sole province of the Court. * * * *

[I]t is of extreme moment that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. * * * *

CUSHING, *Justice:*—The grand and principal question in this case is, whether a State can, by the Federal Constitution, be sued by an individual citizen of another State? The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the United States; and particularly upon the extent of powers given to the Federal Judicial in the second section of the third article of the Constitution. * * * *

When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a Defendant, because it would effect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; "controversies between two or more States," where a State must of necessity be Defendant? If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? * * * *

One design of the general Government was for managing the great affairs of peace and war and the general defence; which were impossible to be conducted, with safety, by the States separately. Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremeties and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. Thus, States at home and their citizens, and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as-to controversies between them. So also, with respect to controversies between a State and citizens of another State (at home) comparing all the clauses together, the remedy is reciprocal; the claim to justice equal. As controversies between State and State,

and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further; if a State is entitled to Justice in the Federal Court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government. * * * *

Whatever power is deposited with the Union by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States. * * * * Thus the power of declaring war, making peace, raising and supporting armies for public defence, levying duties, excises and taxes, if necessary, with many other powers, are lodged in Congress; and are a most essential abridgement of State sovereignty. Again; the restrictions upon States; "No State shall enter into any treaty, alliance, or confederation, coin money, emit bills of credit, make any thing but gold and silver a tender in payment of debts, pass any law impairing the obligation of contracts;" these, with a number of others, are important restrictions of the power of States, and were thought necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union. So that, I think, no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. * * * *

BLAIR, *Justice:*—[Justice Blair focused on the text of Article III and argued along the lines of Justice Cushing's opinion. He also reasoned:] It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where a State is a party. Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that Congress has not provided any form of execution, or pointed out any mode of making the judgment against a State effectual; the argument *ab in utili* may weigh much in cases depending upon the construction of doubtful Legislative acts, but can have no force, I think, against the clear and positive directions of an act of Congress and of the Constitution. * * * * [I]f sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty. * * * *

WILSON, *Justice:*—This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this "do the people of the United States form a Nation?" * * * *

[I]n an instrument well drawn, as in a poem well composed, silence is sometimes most expressive. To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration. * * * *

States and Governments were made for man * * *. Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance. * * * * By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are men. * * * * Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended that there is. * * * *

In one sense, the term sovereign has for its correlative, subject. In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. * * * * The term, subject, occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet "foreign" is prefixed. * * * * In another sense, * * * every State, which governs itself without any dependence on another power, is a sovereign State. * * * * As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State. If the Judicial decision of this case forms one of those purposes; the allegation, that Georgia is a sovereign State, is unsupported by the fact. * * * *

There is a third sense, in which the term sovereign is frequently used * * *. In this sense, sovereignty is derived from a feudal source; and like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American States. * * * * Into England this system was introduced by the conqueror: and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of Justice. But, in the case of the King, the sovereignty had a double operation. While it vested him with

jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction. "The law," says Sir William Blackstone, "ascribes to the King the attribute of sovereignty: he is sovereign and independent within his own dominions; and owes no kind of objection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the King, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power." * * * * The principle is, that all human law must be prescribed by a superior. This principle I mean not now to examine. Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man. * * * *

With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object, which the nation could present. "The PEOPLE of the United States" are the first personages introduced. * * * * The question now opens fairly to our view, could the people of those States, among whom were those of Georgia, bind those States, and Georgia among the others, by the Legislative, Executive, and Judicial power so vested? * * * * If those States were the work of those people; those people, and, that I may apply the case closely, the people of Georgia, in particular, could alter, as they pleased, their former work: To any given degree, they could diminish as well as enlarge it. Any or all of the former State-powers, they could extinguish or transfer. The inference, which necessarily results, is, that the Constitution ordained and established by those people; and, still closely to apply the case, in particular by the people of Georgia, could vest jurisdiction or judicial power over those States and over the State of Georgia in particular. * * * *

Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? * * * * "The judicial power of the United States shall extend to controversies, between a state and citizens of another State." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind. * * * *

JAY, *Chief Justice:*—The question we are now to decide has been accurately stated, viz. Is a State suable by individual citizens of another State? * * * * In order to ascertain the merits of this objection, let us enquire, 1st. In what sense Georgia is a sovereign State. 2nd. Whether suability is incompatible with such sovereignty. 3rd. Whether the Constitution (to which Georgia is a party) authorizes such an action against her. * * * *

1st. * * * * The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it * * * and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, etc. etc. * * * * [A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty. * * * *

2nd. The second object of enquiry now presents itself, viz. whether suability is compatible with State sovereignty. Suability, by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally, sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any

individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? * * * * In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of Delaware holds an office of superior rank to the Mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice. * * * *

[3rd.] Let us now proceed to enquire whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State. * * * * Prior to the date of the Constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least control. [Chief Justice Jay here noted problems associated with the absence of a national tribunal that could correct errors of state courts, resolve inter-state disputes, enforce treaties, and so on.] * * * * These were among the evils against which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation. * * * *

The question now before us renders it necessary to pay particular attention to that part of the second section, which extends the judicial power "to controversies between a state and citizens of another state." It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a State may be Plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense. This extension of power is remedial, because it is to settle controversies. It is therefore, to be construed liberally. It is politic, wise, and good that, not only the controversies, in which a State is Plaintiff, but also those in which a State is Defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. * * * * If the Constitution really meant to extend these powers only to those controversies in which a State might be Plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it * * * *.

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as to the many against the few. * * * * We find the Legislature of the United States expressing themselves in the like general and comprehensive manner; they speak in the thirteenth section of the judicial act, of controversies where a State

is a party, and as they do not impliedly or expressly apply that term to either of the litigants, in particular, we are to understand them as speaking of both. * * * *

[I]t is to be regretted that the provision in it which we have been considering, has not in every instance received the approbation and acquiescence which it merits. Georgia has in strong language advocated the cause of republican equality: and there is reason to hope that the people of that State will yet perceive that it would not have been consistent with that equality, to have exempted the body of her citizens from that suability, which they are at this moment exercising against citizens of another State. * * * * For the reasons before given, I am clearly of opinion, that a State is suable by citizens of another State * * * *.

4. The Eleventh Amendment is Adopted

Constitutional historian Charles Warren asserted that the *Chisholm* decision "fell upon the country with a profound shock." 2 Charles Warren, The Supreme Court in United States History: 1789–1835, at 98 (1935). That characterization has been disputed, and some public support was voiced for the result at the time. But numerous critics lamented the threat to their notions of state sovereignty, to decentralized power in a federal system, and to state finances. The Georgia House of Representatives went so far as to approve a bill that would have imposed the death penalty on anyone attempting to execute process in the case. *See id.* at 100; *see also* David P. Currie, The Constitution in Congress: The Federalist Period, 1789–1801, at 195–96 (1997); John V. Orth, The Judicial Power of the United States: The Eleventh Amendment in American History (1987); 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 722–26 (1971). More temperate efforts to nullify *Chisholm* were successful.

Warren and others report that, the day after the decision, a resolution to amend the Constitution was introduced in the United States House of Representatives. That proposal was relatively broad: "no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States." Warren, *supra*, at 101; *see* Calvin R. Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61, 111 n. 264 (1989) (noting a debate over whether this proposal was ever introduced in Congress). That version was not the text referred to the States for ratification.

On the other hand, apparently narrower alternatives were defeated as well. One of them would have expressly excepted "cases arising under treaties, made under the authority of the United States" from the new limitation on the federal judicial power, Journal of the Senate 19 (Jan. 14, 1794) (amendment proposed by Sen. Gallatin); another would have barred suits "against one of the United States by citizens of another State, or by citizens or subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment," thereby preserving such suits going forward, *id.* (amendment proposed by an

unidentified Senator); a third would have limited the scope of the amendment to situations "[w]here such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect," Journal of the House 79 (Mar. 4, 1794) (amendment proposed by an unidentified Representative).

The version of the Eleventh Amendment actually agreed to was introduced in the Senate and passed there with well more than the necessary two-thirds vote on January 14, 1794. 4 Annals of Congress 30. The House concurred on March 4. *Id.* at 477; Journal of the House 79–80 (Mar. 4, 1794); *see* Warren, *supra*, at 101; Currie, *supra*, at 196. The following year, a sufficient number of state legislatures ratified the Amendment, and so the following text was added to the Constitution:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. art. XI.

5. The Reach of the Eleventh Amendment and State Sovereign Immunity

Everyone agrees that the Eleventh Amendment repudiated the result in *Chisholm*, which addressed a suit for monetary relief against a State filed by a private party who was not a citizen of that State. The field of controversy has been whether the Amendment achieved much else, or whether other sources of constitutional law protect some degree of state sovereignty in general, and state sovereign immunity in particular. In several cases, States have been protected from suits that do not plainly fall within the textual boundaries of the Eleventh Amendment, but which implicate robust versions of state sovereign immunity. For example:

a. Suits raising federal statutory or constitutional claims.—Some have argued that the Eleventh Amendment should not affect federal question jurisdiction. The thought here is that the Amendment was written solely to confine the scope of the citizen-state diversity clauses in Article III, § 2 (extending the judicial power to "Controversies * * * between a State and Citizens of another State * * * and between a State * * * and foreign * * * Citizens or Subjects"). That argument was rejected by the Supreme Court during the late 1800s, *see Hans v. Louisiana*, 134 U.S. 1, 10 (1890), although some scholars and judges would like to revive the idea, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 114 (1996) (Souter, J., dissenting). Justice Scalia once conceded that the narrow, diversity-based reading of the Amendment's text is the most reasonable, but he and others on the Court have argued that the Amendment does not mark the outer boundary of state sovereign immunity. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989) (Scalia, J., dissenting).

b. Suits against the plaintiff's home State.—The plaintiff in *Hans v. Louisiana*, 134 U.S. 1 (1890), held bonds and interest coupons that were issued pursuant to Louisiana statute in 1874. Such bonds were used to finance public improvements during Reconstruction. But Louisiana's 1879 Constitution repudiated the State's obligation to pay interest, and so Hans sued Louisiana in

federal court. Hans was a citizen of Louisiana, so the text of the Eleventh Amendment did not reach him. And he asserted a claim (at least nominally) arising under federal law—the Contracts Clause. The Supreme Court nevertheless held that the suit could not be maintained. The Court partly relied on Justice Iredell's dissent in *Chisholm* and Federalist No. 81, and argued that, because a *non-state* citizen cannot sue a non-consenting state on even a federal-law claim, it would be anomalous to permit an *in-state* citizen to do the same. But one segment in the opinion rested on the absence of explicit congressional authority to entertain the suit, leaving the decision's meaning less-than-clear.

c. Suits by foreign countries.—Unlike Article III, § 2, the Eleventh Amendment does not refer to foreign States themselves, just their citizens or subjects. Nevertheless, the Supreme Court has barred suits against States by foreign governments. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

6. Some Limits to the Eleventh Amendment and State Sovereign Immunity

Yet the Supreme Court has recognized a variety of situations in which federal courts may entertain suits that threaten State interests. Some of these situations may be in tension with the text of the Eleventh Amendment, but they do implement an understanding of state sovereign immunity within a federal system of government. Consider the following examples:

a. States may consent to suit.—On its face, the Eleventh Amendment is a direction about how to interpret the scope of "[t]he Judicial power of the United States," as outlined in Article III. One might fairly assume that the preferences of the parties to a lawsuit have no bearing on whether a case or controversy falls within the heads on jurisdiction enumerated in Article III, § 2. Suits against States do not follow this assumption. A State may consent to suit in federal court. *See, e.g.*, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (explaining that "a State may waive its sovereign immunity by consenting to suit" in a case involving an out-of-state plaintiff). The State's consent to suit in federal court must be express—as by state statutory text—but it will be effective. *See id.* at 675–76, 679–81 & n.3 (States do not waive immunity by engaging in for-profit commercial activity that would expose a private party to liability, but they may waive immunity by voluntarily invoking the jurisdiction of a federal court). Accordingly Congress may, within other constitutional limits, induce States to voluntarily waive their immunity from private suit in exchange for federal benefits. *See Alden*, 527 U.S. at 755 (dicta); *College Savings Bank*, 527 U.S. at 686–87 (indicating that Congress may withhold federal "gratuities," but not impose "sanctions," as a response to a State's refusal to waive sovereign immunity).

b. Suits against state officers, depending on the relief requested.—The Supreme Court permits private parties to assert federal claims against individual state officers, as opposed to their State employers. *See Ex parte Young*, 209 U.S. 123 (1908) (arising from a contempt proceeding against the Minnesota Attorney General for his enforcement of railroad-rate regulations). One rationale in *Young*

was that an officer attempting to enforce an unconstitutional state statute was stripped of his state authority, and therefore could not take advantage of his State's immunity. Among other puzzles, that reasoning makes it difficult to see how the authority-bare individual could be a state actor able to violate the Constitution in the first place. Other arguments for officer suits include tradition and the importance of preserving adequate remedies to halt or prevent state action in violation of federal law. *See, e.g.*, *Green v. Mansour*, 474 U. S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Suing individual state officers is not a complete end-run around the Eleventh Amendment and state sovereign immunity, however. For example, *Young* plaintiffs might obtain prospective injunctive relief against state officers to cure ongoing violations of federal law, but they cannot use such suits to demand compensatory money damages directly from the State treasury. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *see also* 42 U.S.C. § 1983 (authorizing injunctive relief and even damages against state officers for deprivations of federal rights).

c. The United States Supreme Court may exercise appellate jurisdiction over state courts.—In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall confined the Eleventh Amendment to permit his Court to hear defendants' appeals from state convictions. Cohens was a citizen of Virginia, so the plain text of the Amendment did not reach his case; but Marshall also reasoned that an appeal was not a "suit" for Eleventh Amendment purposes. The Supreme Court has reached the same result more recently, in cases where a private party had been permitted to file suit against a State in its own courts. "It is 'inherent in the constitutional plan' that when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case * * *." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 30 (1990) (citation omitted); *accord South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 163, 166 (1999) (involving a suit by an out-of-state corporation).

d. The United States may sue a State.—The Eleventh Amendment inhibits suits "by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Federal Government does not qualify. *See United States v. Mississippi*, 380 U.S. 128, 140–41 (1965); *United States v. Texas*, 143 U.S. 621 (1892). As well, "The States have consented * * * to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments. In ratifying the Constitution, the States consented to suits brought by * * * the Federal Government. * * * * Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Alden v. Maine*, 527 U.S. 706, 755–56 (1999) (dicta).[1]

[1] Note finally that States may sue each other in federal court, *Alden*, 527 U.S. at 755 (dicta), and that anyone may sue local governments. A city, county, school district, or other political subdivision that is not an arm of the State is not considered "one of the United States" for purposes of the Eleventh Amendment. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890); *see also Alden*, 527 U.S. at 756 (dicta).

7. May Congress Abrogate State Sovereign Immunity?

We might be able to adopt all of the above results and nevertheless conclude that Congress has authority to coercively eliminate a State's immunity from suit. Perhaps: (1) the States enjoyed a common-law immunity from suit in their own courts before the Federal Constitution was ratified; and (2) ratification itself neither eliminated that immunity wholesale, nor even insofar as Article III authorized federal jurisdiction over States; but (3) that immunity remained a common-law doctrine and therefore it can be abrogated by any legislature, including Congress, when otherwise acting within its constitutional authority. In other words, it is conceivable that state sovereign immunity *survived* ratification of the Federal Constitution, but was not *embedded* in that Constitution by its ratification or by adoption of the Eleventh Amendment a few years later.

This has been the debate at the Supreme Court over the last twenty years. Is sovereign immunity a presumption merely tolerated by the Federal Constitution, unless and until Congress says otherwise? Or is state sovereign immunity *itself* a constitutional value—either an aspect of sovereignty retained by the States, or at least a principle that influences the interpretation of Article III, § 2? If the latter, will state sovereign immunity ever yield to congressional policy?

a. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)

Chief Justice REHNQUIST delivered the opinion of the Court.

The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 102 Stat. 2475, 25 U.S.C. § 2710(d)(1)(C). The Act, passed by Congress under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. * * * *

I

* * * * In September 1991, the Seminole Tribe of Florida, petitioner, sued the State of Florida * * *. [The Tribe] alleged that [Florida] had "refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact," thereby violating the "requirement of good faith negotiation" contained in § 2710(d)(3). [Florida] moved to dismiss the complaint, arguing that the suit violated the State's sovereign immunity from suit in federal court. * * * *

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . .

. which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,'" *id.*, at 13 (emphasis deleted), quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). See also *Puerto Rico Aqueduct and Sewer Authority*, *supra*, at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity"). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans*, *supra*, at 15.

Here, petitioner has sued the State of Florida and it is undisputed that Florida has not consented to the suit. See *Blatchford*, *supra*, at 782 (States by entering into the Constitution did not consent to suit by Indian tribes). Petitioner nevertheless contends that its suit is not barred by state sovereign immunity. [It] argues that Congress through the Act abrogated the States' sovereign immunity. * * * *

II

* * * * Having concluded that Congress clearly intended to abrogate the States' sovereign immunity through § 2710(d)(7), we turn now to consider whether the Act was passed "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S., at 68. * * * * Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? See, *e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–456 (1976). Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. *Id.*, at 455. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See *id.*, at 453 (internal quotation marks omitted). We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

In only one other case has congressional abrogation of the States' Eleventh Amendment immunity been upheld. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of the Court found that the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity, stating that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." 491 U.S., at 19–20. Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he "[did] not agree with much of [the

plurality's] reasoning." *Id.*, at 57 (opinion concurring in judgment in part and dissenting in part).

* * * * [A]ccepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that Clause grants Congress the power to abrogate the States' sovereign immunity. * * * * We think it clear that Justice Brennan's opinion finds Congress' power to abrogate under the Interstate Commerce Clause from the States' cession of their sovereignty when they gave Congress plenary power to regulate interstate commerce. See *Union Gas*, 491 U.S., at 17 ("The important point . . . is that the provision both expands federal power and contracts state power"). * * * * Following the rationale of the *Union Gas* plurality, our inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. The answer to that question is obvious. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes. * * * *

* * * * Generally, the principle of *stare decisis*, and the interests that it serves * * * counsel strongly against reconsideration of our precedent. Nevertheless, we always have treated *stare decisis* as a "principle of policy," *Helvering v. Hallock*, 309 U.S. 106 (1940), and not as an "inexorable command," *Payne*, 501 U.S., at 828. "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Id.*, at 827. Our willingness to reconsider our earlier decisions has been "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne*, *supra*, at 828.

The Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court. * * * * Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision. * * * * The plurality's rationale also deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans.* See *Union Gas*, *supra*, at 36 ("If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all") (SCALIA, J., dissenting). It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point: "The Judicial power of the United States shall not be construed to extend to any suit . . . ." And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III," *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97–98 (1984). As the dissent in *Union Gas* recognized, the plurality's conclusion—that Congress could under Article I expand the scope

of the federal courts' jurisdiction under Article III—"contradict[ed] our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction." *Union Gas*, *supra*, 491 U.S., at 39.

Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). * * * * The plurality's extended reliance upon our decision in *Fitzpatrick v. Bitzer*, that Congress could under the Fourteenth Amendment abrogate the States' sovereign immunity was also, we believe, misplaced. *Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment. As the dissent in *Union Gas* made clear, *Fitzpatrick* cannot be read to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution." *Union Gas*, *supra*, 491 U.S., at 42 (SCALIA, J., dissenting). In the five years since it was decided, *Union Gas* has proved to be a solitary departure from established law. * * * * We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.

For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment. [See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321–323 (1934) ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. * * * * There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'"); *Pennhurst*, 465 U.S., at 98; *Ex parte New York*, 256 U.S., at 497]. It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity (save in *Union Gas*). But consideration of that question must proceed with fidelity to this century-old doctrine.

The dissent, to the contrary, disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. The dissent cites not a single decision since *Hans* (other than *Union Gas*) that supports its view of state sovereign immunity, instead relying upon the now-discredited decision in *Chisholm v. Georgia*. Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication.

The dissent mischaracterizes the *Hans* opinion. That decision found its roots

not solely in the common law of England, but in the much more fundamental "'jurisprudence in all civilized nations.'" *Hans*, 134 U.S., at 17, quoting *Beers v. Arkansas*, 20 How. 527, 529, 15 L.Ed. 991 (1858); see also The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (sovereign immunity "is the general sense and the general practice of mankind"). The dissent's proposition that the common law of England, where adopted by the States, was open to change by the Legislature is wholly unexceptionable and largely beside the point: that common law provided the substantive rules of law rather than jurisdiction. Cf. *Monaco*, *supra*, at 323 (state sovereign immunity, like the requirement that there be a "justiciable" controversy, is a constitutionally grounded limit on federal jurisdiction). It also is noteworthy that the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment.

Hans—with a much closer vantage point than the dissent—recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution. * * * * That decision created "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco*, *supra*, at 325. The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man—we long have recognized that blind reliance upon the text of the Eleventh Amendment is "'to strain the Constitution and the law to a construction never imagined or dreamed of.'" *Monaco*, *supra*, 292 U.S., at 326, quoting *Hans*, *supra*, 134 U.S., at 15. The text dealt in terms only with the problem presented by the decision in *Chisholm* * * *.

That same consideration causes the dissent's criticism of the views of Marshall, Madison, and Hamilton to ring hollow. The dissent cites statements made by those three influential Framers, the most natural reading of which would preclude all federal jurisdiction over an unconsenting State.[12] Struggling against this reading, however, the dissent finds significant the absence of any contention that sovereign immunity would affect the new federal- question jurisdiction. But the lack of any statute vesting general federal-question jurisdiction in the federal courts until much later makes the dissent's demand for greater specificity about a then-dormant jurisdiction overly exacting.[13]

In putting forward a new theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers, concluding

[12] We note here also that the dissent quotes selectively from the Framers' statements that it references. The dissent cites the following, for instance, as a statement made by Madison: "[T]he Constitution 'give[s] a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.'" But that statement, perhaps ambiguous when read in isolation, was preceded by the following: "[J]urisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal courts. It appears to me that this can have no operation but this:" See 3 J. Elliot, Debates on the Federal Constitution 533 (2d ed. 1836).

[13] Although the absence of any discussion dealing with federal-question jurisdiction is therefore unremarkable, what is notably lacking in the Framers' statements is any mention of Congress' power to abrogate the States' immunity. * * * *

with the statement that "[t]he Framers' principal objectives in rejecting English theories of unitary sovereignty . . . would have been impeded if a new concept of sovereign immunity had taken its place in federal-question cases, and would have been substantially thwarted if that new immunity had been held untouchable by any congressional effort to abrogate it."[14] This sweeping statement ignores the fact that the Nation survived for nearly two centuries without the question of the existence of such power ever being presented to this Court. And Congress itself waited nearly a century before even conferring federal-question jurisdiction on the lower federal courts.

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction. * * * * [The Court then considered and rejected the propriety of federal suit against the Governor of Florida for prospective injunctive relief under *Ex parte Young*, emphasizing that suit against the State itself was the only remedy authorized by Congress.]

Justice STEVENS, dissenting.

This case is about power—the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right. * * * * [I]n a sharp break with the past, today the Court holds that with the narrow and illogical exception of statutes enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, Congress has no such power. The importance of the majority's decision to overrule the Court's holding in *Pennsylvania v. Union Gas Co.* cannot be overstated. The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good-faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy. There may be room for debate over whether, in light of the Eleventh Amendment, Congress has the power to ensure that such a cause of action may

[14] This argument wholly disregards other methods of ensuring the States' compliance with federal law: The Federal Government can bring suit in federal court against a State, see, *e.g.*, *United States v. Texas*, 143 U.S. 621, 644–645 (1892); an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law, see, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); and this Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit, see, *e.g.*, *Cohens v. Virginia*, 6 Wheat. 264, 5 L.Ed. 257 (1821).

be enforced in federal court by a citizen of another State or a foreign citizen. There can be no serious debate, however, over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued. Congress' authority in that regard is clear. * * * *

[Justice Stevens went on to criticize "the shocking character of the majority's affront to a coequal branch of our Government." He presented narrow readings of *Hans* and Justice Iredell's dissent in *Chisholm*, arguing that both opinions turned on "an interpretation of an Act of Congress rather than a want of congressional power to authorize a suit against the State." State sovereign immunity should be viewed as nothing more than common law left untouched by Article III. In his view, *Hans* "reflects, at the most, this Court's conclusion that, as a matter of federal common law, federal courts should decline to entertain suits against unconsenting States." On this version, state sovereign immunity can be overridden by legislative will—in cases, like the one at bar, not covered by the text of the Eleventh Amendment. He distinguished *Principality of Monaco* because it involved a state-law claim, and emphasized that Federalist No. 81 discussed contractual disputes.]

[Justice Stevens also questioned the validity of any doctrine of sovereign immunity.] Three features of its English ancestry make it particularly unsuitable for incorporation into the law of this democratic Nation. First, the assumption that it could be supported by a belief that "the King can do no wrong" has always been absurd * * * *. Second, centuries ago the belief that the monarch served by divine right made it appropriate to assume that redress for wrongs committed by the sovereign should be the exclusive province of still higher authority. While such a justification for a rule that immunized the sovereign from suit in a secular tribunal might have been acceptable in a jurisdiction where a particular faith is endorsed by the government, it should give rise to skepticism concerning the legitimacy of comparable rules in a society where a constitutional wall separates the State from the Church. Third, in a society where noble birth can justify preferential treatment, it might have been unseemly to allow a commoner to hale the monarch into court. Justice Wilson explained how foreign such a justification is to this Nation's principles. See *Chisholm v. Georgia*, 2 Dall., at 455. Moreover, Chief Justice Marshall early on laid to rest the view that the purpose of the Eleventh Amendment was to protect a State's dignity. *Cohens v. Virginia*, 6 Wheat. 264, 406–407 (1821) [(protection from creditors)]. * * * * In this country the sovereignty of the individual States is subordinate both to the citizenry of each State and to the supreme law of the federal sovereign.

* * * * I recognize that federalism concerns—and even the interest in protecting the solvency of the States that was at work in *Chisholm* and *Hans*—may well justify a grant of immunity from federal litigation in certain classes of cases. Such a grant, however, should be the product of a reasoned decision by the policymaking branch of our Government. For this Court to conclude that timeworn shibboleths iterated and reiterated by judges should take precedence over the deliberations of the Congress of the United States is simply irresponsible. * * * * [Justice Stevens also made clear that he agreed with the reasoning in Justice Souter's separate dissent.]

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.[*] * * * *

It is useful to separate three questions: (1) whether the States enjoyed sovereign immunity if sued in their own courts in the period prior to ratification of the National Constitution; (2) if so, whether after ratification the States were entitled to claim some such immunity when sued in a federal court exercising jurisdiction either because the suit was between a State and a nonstate litigant who was not its citizen, or because the issue in the case raised a federal question; and (3) whether any state sovereign immunity recognized in federal court may be abrogated by Congress.

The answer to the first question is not clear, although some of the Framers assumed that States did enjoy immunity in their own courts. The second question was not debated at the time of ratification, except as to citizen-state diversity jurisdiction; there was no unanimity, but in due course the Court in *Chisholm v. Georgia* answered that a state defendant enjoyed no such immunity. As to federal-question jurisdiction, state sovereign immunity seems not to have been debated prior to ratification, the silence probably showing a general understanding at the time that the States would have no immunity in such cases.

The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants. I will explain why the Eleventh Amendment did not affect federal-question jurisdiction, a notion that needs to be understood for the light it casts on the soundness of *Hans*'s holding that States did enjoy sovereign immunity in federal-question suits. The *Hans* Court erroneously assumed that a State could plead sovereign immunity against a noncitizen suing under federal-question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens. The error of *Hans*'s reasoning is underscored by its clear inconsistency with the Founders' hostility to the implicit reception of common-law doctrine as federal law, and with the Founders' conception of sovereign power as divided between the States and the National Government for the sake of very practical objectives.

The Court's answer today to the third question is likewise at odds with the Founders' view that common law, when it was received into the new American legal system, was always subject to legislative amendment. In ignoring the reasons for this pervasive understanding at the time of the ratification, and in holding that a nontextual common-law rule limits a clear grant of congressional power under Article I, the Court follows a course that has brought it to grief before in our history, and promises to do so again. * * * *

[*] [Editor's note: Justice Souter's *Seminole* dissent covers about 85 pages in the United States Reports. 517 U.S. at 100–185. He supplemented his arguments during a 54-page dissent in *Alden v. Maine*, 527 U.S. 706, 760–814 (1999). And Justice Kennedy's opinion for the Court in *Alden* is, in part, an extended response to Justice Souter that was not provided by the *Seminole* majority. *See Alden*, 527 U.S. at 712–760. No excerpt from these opinions can satisfy anyone interested in thoroughly assessing the historical arguments—a goal that probably requires assistance from the writings of professional legal historians as well. Instead, the materials for this class merely frame the legal issues and arguments.]

Whatever the scope of sovereign immunity might have been in the Colonies, however, or during the period of Confederation, the proposal to establish a National Government under the Constitution drafted in 1787 presented a prospect unknown to the common law prior to the American experience: the States would become parts of a system in which sovereignty over even domestic matters would be divided or parceled out between the States and the Nation, the latter to be invested with its own judicial power and the right to prevail against the States whenever their respective substantive laws might be in conflict. With this prospect in mind, the 1787 Constitution might have addressed state sovereign immunity by eliminating whatever sovereign immunity the States previously had, as to any matter subject to federal law or jurisdiction; by recognizing an analogue to the old immunity in the new context of federal jurisdiction, but subject to abrogation as to any matter within that jurisdiction; or by enshrining a doctrine of inviolable state sovereign immunity in the text, thereby giving it constitutional protection in the new federal jurisdiction.

The 1787 draft in fact said nothing on the subject, and it was this very silence that occasioned some, though apparently not widespread, dispute among the Framers and others over whether ratification of the Constitution would preclude a State sued in federal court from asserting sovereign immunity as it could have done on any matter of nonfederal law litigated in its own courts. As it has come down to us, the discussion gave no attention to congressional power under the proposed Article I but focused entirely on the limits of the judicial power provided in Article III. And although the jurisdictional bases together constituting the judicial power of the national courts under § 2 of Article III included questions arising under federal law and cases between States and individuals who are not citizens, it was only upon the latter citizen-state diversity provisions that preratification questions about state immunity from suit or liability centered.[4]

* * * * One other point, however, was also clear: the debate addressed only the question whether ratification of the Constitution would, in diversity cases and without more, abrogate the state sovereign immunity or allow it to have some application. We have no record that anyone argued for the third option mentioned above, that the Constitution would affirmatively guarantee state sovereign immunity against any congressional action to the contrary. Nor would there have been any apparent justification for any such argument, since no clause in the proposed (and ratified) Constitution even so much as suggested such a position. It may have been reasonable to contend (as we will see that Madison, Marshall, and Hamilton did) that Article III would not alter States' pre-existing common-law immunity despite its unqualified grant of jurisdiction over diversity suits

[4] The one statement I have found on the subject of States' immunity in federal-question cases was an opinion that immunity would not be applicable in these cases: James Wilson, in the Pennsylvania ratification debate, stated that the federal-question clause would require States to make good on pre-Revolutionary debt owed to English merchants (the enforcement of which was promised in the Treaty of 1783) and thereby "show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." 2 J. Elliot, Debates on the Federal Constitution 490 (2d ed. 1836) (Elliot's Debates).

against States. But then, as now, there was no textual support for contending that Article III or any other provision would "constitutionalize" state sovereign immunity, and no one uttered any such contention. * * * *

The Eleventh Amendment, of course, repudiated *Chisholm* and clearly divested federal courts of some jurisdiction as to cases against state parties * * *. There are two plausible readings of this provision's text. Under the first, it simply repeals the Citizen-State Diversity Clauses of Article III for all cases in which the State appears as a defendant. Under the second, it strips the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit. * * * * The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses. [See *Cohens v. Virginia*, 6 Wheat. 264, 383, 407, 5 L.Ed. 257 (1821).] * * * * [In any event, b]ecause the plaintiffs in today's case are citizens of the State that they are suing, the Eleventh Amendment simply does not apply to them. * * * *[13]

[Justice Souter then argued that *Hans* at most recognized a common-law immunity, and in any event was wrongly decided. His explanation for *Hans*'s errors was historical.] * * * * *Hans* was one episode in a long story of debt repudiation by the States of the former Confederacy after the end of Reconstruction. The turning point in the States' favor came with the Compromise of 1877, when the Republican Party agreed effectively to end Reconstruction and to withdraw federal troops from the South in return for Southern acquiescence in the decision of the Electoral Commission that awarded the disputed 1876 presidential election to Rutherford B. Hayes. See J. Orth, Judicial Power of the United States: The Eleventh Amendment in American History 53–57 (1987); Gibbons, at 1978–1982; see generally Foner, Reconstruction, at 575–587 (describing the events of 1877 and their aftermath). The troop withdrawal, of course, left the federal judiciary "effectively without power to resist the rapidly coalescing repudiation movement." Gibbons, 83 Colum. L. Rev., at 1981. Contract Clause suits like the one brought by Hans thus presented this Court with "a draconian choice between repudiation of some of its most inviolable constitutional doctrines and the humiliation of seeing its political authority compromised as its judgments met the resistance of hostile state governments." *Id.*, at 1974. Indeed, Louisiana's brief in *Hans* unmistakably bore witness to this Court's inability to enforce a judgment against a recalcitrant State: "The solemn obligation of a government arising on its own acknowledged bond would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is probable that it could not or would not make provision for satisfying the judgment." Brief for Respondent in No. 4, O.T. 1889, p. 25. Given the likelihood that a judgment against the State could not be enforced, it is not wholly surprising that the *Hans* Court found a way to avoid the certainty of the State's contempt. So it is that history explains, but does not

[13] The majority chides me that the "lengthy analysis of the text of the Eleventh Amendment is directed at a straw man." But plain text is the Man of Steel in a confrontation with "background principle[s]" and "'postulates which limit and control.'" * * * *

honor, Hans. The ultimate demerit of the case centers, however, not on its politics but on the legal errors on which it rested. [Justice Souter's detailed critique is omitted; later in his dissent he stated that he would not overrule *Hans*, however.]

* * * * [State sovereign immunity's] common-law status in the period covering the founding and the later adoption of the Eleventh Amendment should have raised a warning flag to the *Hans* Court and it should do the same for the Court today. * * * * The consequence of * * * anti-English hostility and awareness of changed circumstances was that the independent States continued the colonists' practice of adopting only so much of the common law as they thought applicable to their local conditions. * * * * [And] the 1787 draft Constitution contained no provision for adopting the common law at all. This omission stood in sharp contrast to the state constitutions then extant, virtually all of which contained explicit provisions dealing with common-law reception. Since the experience in the States set the stage for thinking at the national level, see generally G. Wood, Creation of the American Republic, 1776–1787, p. 467 (1969) (Wood), this failure to address the notion of common-law reception could not have been inadvertent. Instead, the Framers chose to recognize only particular common-law concepts, such as the writ of habeas corpus, U.S. Const., Art. I, § 9, cl. 2, and the distinction between law and equity, U.S. Const., Amdt. 7, by specific reference in the constitutional text. This approach reflected widespread agreement that ratification would not itself entail a general reception of the common law of England. * * * * [Nor was there] any unified "Common Law" in America that the Federal Constitution could adopt and, in particular, probably no common principle of sovereign immunity. * * * *

[The] Framers and their contemporaries did not agree about the place of common-law state sovereign immunity even as to federal jurisdiction resting on the Citizen-State Diversity Clauses. * * * * [And the] Court's attempt to convert isolated statements by the Framers into answers to questions not before them is fundamentally misguided. The Court's difficulty is far more fundamental, however, than inconsistency with a particular quotation, for the Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' enterprise. An enquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.

* * * * [The] act of ratification affected [state] sovereignty in a way different from any previous political event in America or anywhere else. For the adoption of the Constitution made them members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy. As a matter of political theory, this federal arrangement of dual delegated sovereign powers truly was a more revolutionary turn than the late war had been. See, *e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty"). Before the new federal scheme appeared, 18th-century political theorists had assumed that "there must reside somewhere in every

political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself." B. Bailyn, The Ideological Origins of the American Revolution 198 (1967); see also Wood 345. The American development of divided sovereign powers, which "shatter[ed] . . . the categories of government that had dominated Western thinking for centuries," *id.*, at 385, was made possible only by a recognition that the ultimate sovereignty rests in the people themselves. The People possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit. * * * * Under such a scheme, Alexander Hamilton explained, "[i]t does not follow . . . that each of the *portions* of powers delegated to [the national or state government] is not sovereign *with regard to its proper objects.*" Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, in 8 Papers of Alexander Hamilton 98 (Syrett ed.1965) (emphasis in original). * * * *

[S]overeign immunity as it would have been known to the Framers before ratification thereafter became inapplicable as a matter of logic in a federal suit raising a federal question. The old doctrine, after all, barred the involuntary subjection of a sovereign to the system of justice and law of which it was itself the font, since to do otherwise would have struck the common-law mind from the Middle Ages onward as both impractical and absurd. But the ratification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign power to a National Government that was paramount within its delegated sphere. When individuals sued States to enforce federal rights, the Government that corresponded to the "sovereign" in the traditional common-law sense was not the State but the National Government, and any state immunity from the jurisdiction of the Nation's courts would have required a grant from the true sovereign, the people, in their Constitution, or from the Congress that the Constitution had empowered. * * * *

State immunity to federal-question jurisdiction would, moreover, have run up against the common understanding of the practical necessity for the new federal relationship. * * * * Given the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights. * * * * The very idea of a federal question depended on the rejection of the simple concept of sovereignty from which the immunity doctrine had developed; under the English common law, the question of immunity in a system of layered sovereignty simply could not have arisen. The Framers' principal objectives in rejecting English theories of unitary sovereignty, moreover, would have been impeded if a new concept of sovereign immunity had taken its place in federal question cases, and would have been substantially thwarted if that new immunity had been held to be untouchable by any congressional effort to abrogate it. * * * * [T]oday's decision stands condemned alike by the Framers' abhorrence of any notion that such common-law rules as might be received into the new legal systems would be beyond the legislative power to alter or repeal, and by its

resonance with this Court's previous essays in constitutionalizing common-law rules at the expense of legislative authority. * * * *

b. Abrogation via Congress' Fourteenth Amendment enforcement power.—*Seminole* left Congress with authority to abrogate state sovereign immunity under § 5 of the Fourteenth Amendment, which was ratified after the Union's victory in the Civil War. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Section 5 grants Congress "the power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. Those provisions impose restrictions on state action. Under § 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Congress may therefore "enforce" these restrictions "by appropriate legislation."

What is the scope of this authority? That question has received recent and repeated attention. The Supreme Court has stated that "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). Yet the Court demands that § 5 legislation display "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). If the legislation creates remedies for state action that does not itself violate the Fourteenth Amendment, then the Court has indicated it is important for Congress to identify a history and pattern of unconstitutional action by the States. Recent attempts to use § 5 as an abrogation tool have not met the Supreme Court's test. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (5-4) (invalidating Congress' attempt to expose States to patent-infringement suits); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (5-4) (same for false advertising under the Lanham Act; no due process "property" interest involved); *Kimel*, 528 U.S. at 62 (5-4) (same for age discrimination in employment); *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (5-4) (same for disability discrimination in employment); *see also Nevada Dep't of Human Resources v. Hibbs*, No. 01-1368 (pending) (involving the Family and Medical Leave Act); *Medical Bd. of Cal. v. Hason*, No. 02-479 (pending) (involving disability discrimination by public entities). Still, none of the legislation that the Court has considered since *Seminole* has been particularly well-tailored to catch *actual* violations *of the Fourteenth Amendment*, at least when measured by the Court's interpretation of that Amendment's substantive provisions.

For example, *Kimel* dealt with the Age Discrimination in Employment Act as applied to state employers. The majority reasoned that Congress' § 5 authority is essentially remedial rather than substantive; that is, Congress lacks power to

finally determine what constitutes a violation of the substantive provisions of the Fourteenth Amendment. The Court then concluded that the Act imposed requirements disproportionate to any unconstitutional conduct reached by the statute, in light of the Court's prior rulings that only *irrational* age-based government decisions violate the Equal Protection Clause. "The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." 528 U.S. at 86. In addition, Congress failed to identify a significant pattern of unconstitutional age discrimination by public entities that could justify prophylactic legislation. *Id.* at 89. Note that the Court did not invalidate the Act altogether. Congress' Commerce Clause authority is adequate insofar as the statute regulates *private* employers. But again, since *Seminole* the Court has held that Congress' Article I powers cannot be used to abrogate state sovereign immunity. The four dissenters in *Kimel* refused to accept *Seminole*'s validity, and so they did not have to reach the scope of § 5 authority.

8. State Immunity in Forums Beyond the Federal Courts

Seminole's constitutional immunity has carried beyond lawsuits in federal courts. Non-consenting states now enjoy immunity from federal claims asserted by private parties even in state courts, *see Alden v. Maine*, 527 U.S. 706 (1999), and in at least some federal administrative adjudications prompted by private complaint, *see Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S.Ct. 1864, 1874 (2002) (indicating that immunity's prime purpose "is to accord States the dignity that is consistent with their status as sovereign entities"). These results are obviously not dictated by the text of the Eleventh Amendment, but the same was so of *Seminole*.

In *Alden*, the majority expanded on the rationale for a constitutionally embedded immunity. "[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments. * * * * Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document[.]"

The argument continues, "The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States 'form distinct and independent portions of the supremacy, no more subject, within their respective

spheres, to the general authority than the general authority is subject to them, within its own sphere.' The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison). Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*, *supra*, at 919–920 (quoting The Federalist No. 15, at 109). * * * * The States thus retain 'a residuary and inviolable sovereignty.' The Federalist No. 39, at 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." 527 U.S. at 713–14. The majority also contended, "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity," *id.* at 715, stressing that the proponents of the Constitution assured the people that immunity was an attribute of that sovereignty that the Constitution would not eliminate. "Simply put, 'The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.'" *Id.* at 727 (citation omitted).

The four dissenters, led by Justice Souter, disputed the majority's historical account and associated the Court's theory with both natural law and *Lochner*. "The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting." *Id.* at 814.

Appendix: Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 524–532 (University of North Carolina Press, 1969)

the political assumptions of 1776 had been extended, molded, and perverted in ways that no one had clearly anticipated. Under the severest kinds of political and polemical pressures old words had assumed new meanings, and old institutions had taken on new significance. By 1787 it was entirely possible for the Federalists to turn the Whiggism of 1776 against itself without any sense of intellectual violence. The Federalists, far from seeing themselves as rejecters of populism and the faith of 1776, could now intelligibly picture themselves as the true defenders of the libertarian tradition of Whiggism. "The supporters of the Constitution," said John Marshall in the Virginia Convention, "claim the title of being firm friends of the liberty and the rights of mankind." The Federalists were the real protectors of the people; they "idolize democracy." They admired the Constitution precisely because they "think it a well-regulated democracy." The principle of democracy, declared James Wilson, permeated the Constitution, "in its terms and in its consequences."[9] Such Federalist statements required no conscious wrenching and distortion of ideas, no hypocrisy, because so many piecemeal changes in thought had occurred in the decade since Independence that, without anyone's being fully aware of what was happening, the whole intellectual world of 1776 had become unraveled. Now, under the pressure of the debate over the Constitution, these scattered strands of Whig thought, used disconnectedly for years but never before comprehended as a whole, were picked up and brought together by the Federalists and woven into a new intellectual fabric, a new explanation of politics, of whose beauty and symmetry the Federalists themselves only gradually became aware. In the process those who clung to the principles of 1776 could only stand amazed with confusion, left holding remnants of thought that had lost their significance. The Antifederalists could never offer any effective intellectual opposition to the Constitution because the weapons they chose to use were mostly in their opponents' hands.

2. Consolidation or Confederation

Before they were through with the debate over the Constitution the Federalists had not only turned their opponents' thought

9. Marshall (Va.), in Elliot, ed., *Debates*, III, 222; Wilson, in McMaster and Stone, eds., *Pennsylvania and the Federal Constitution*, 340, 344.

on its head, but they had transformed the Americans' understanding of politics. At the heart of this transformation was the Federalists' conception of the flow and structure of political authority to which they gave their name. Yet as crucial as the idea of federalism was to the Federalists in explaining the operation of their new system, it seems clear that few of them actually conceived of it in full before the Constitution was written and debated. In fact, the leading Federalists had at first thought of the Constitution that emerged from the Philadelphia Convention as something of a failure. The Constitution, Madison told Jefferson in September 1787, "will neither effectually answer its *national object*," nor "prevent the local *mischiefs* which everywhere *excite disgusts* against the State Governments." While most Federalists had no intention of doing away with the states entirely (although some would have), many undoubtedly desired, as William Grayson charged, to establish "a very strong government" in order "to prostrate all the state legislatures, and form a general system out of the whole." Edmund Randolph proposed the Virginia plan, as he candidly confessed, to create not "a federal government" but rather "a strong *consolidated* union, in which the idea of states should be nearly annihilated." The Virginia plan envisioned, said Gouverneur Morris, a "*national, supreme*, Government . . . having a compleat and *compulsive* operation" on individuals, not states, and resting on the principle that "in all communities there must be one supreme power, and one only."[10] The evidence is very strong that the leading nationalists in the Convention inevitably expected a substantial degree of consolidation. As late as the spring of 1787 Madison, for example, showed little comprehension of a political system in which the national and state governments would coexist as equal partners. His "middle ground" in 1787 was not the federalism of 1788, but meant rather "a due supremacy of the national authority" with "the local authorities" left to exist only in "so far as they can be subordinately useful." Both Madison and James Wilson fought hard in the Convention to prevent both equal representation of the states in the Senate and elimination of the congressional veto of all state laws that Congress deemed unjust and unconstitutional. Both proportional representation and the congressional veto, they believed, would deny any recognition of state sover-

10. Madison to Jefferson, Sept. 6, 1787, Boyd, ed., *Jefferson Papers*, XII, 103; William Grayson to James Monroe, May 29, 1787, Farrand, ed., *Records of the Federal Convention*, III, 30; Randolph and Morris, in *ibid.*, I, 24, 34.

eignty in the Constitution, and thus prevent a reversion to the evils of the Confederacy. Concerning the equal representation of the states in the Senate, Rufus King even thought it would be better "to submit to a little more confusion and convulsion, than to submit to such an evil." Yet others in the Convention feared that the states under the Virginia plan would become more insignificant than corporations were in the states. Although James Wilson warned that "we talk of states, till we forget what they are composed of," the nationalists' plan ran too counter to the diverse interests of the country and to the attachments to state integrity to be acceptable, and compromise, or concession as the nationalists saw it, became inevitable.[11]

Nevertheless, however much the most extreme Federalists thought they were surrendering the principle of consolidation in the Constitution that came out of the Philadelphia Convention, the Antifederalists hardly saw it that way. They had no doubt that it was precisely an absorption of all the states under one unified government that the Constitution intended, and they therefore offered this prospect of an inevitable consolidation as the strongest and most scientifically based objection to the new system that they could muster. "The question turns, sir," said Patrick Henry at the opening of the Virginia Convention, "on that poor little thing—the expression, We, the *people*, instead of the *states*, of America." "States," said Henry, "are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states." "I confess, as I enter the Building," said Samuel Adams, "I stumble at the threshold. I meet with a National Government, instead of a Federal Union of Sovereign States." If the phrase, "We, the people," said Samuel Nasson of Massachusetts, "does not go to an annihilation of the state governments, and to a perfect consolidation of the whole Union, I do not know what does." "Instead of being thirteen republics, under a federal head," wrote Richard Henry Lee, the Constitution "is clearly designed to make us one consolidated government." "Instead of securing the sovereignty of the states," said William Lenoir of North Carolina, "it is calculated to melt them down into one solid empire"—an empire that from its very extent would be

11. Madison to Randolph, Apr. 8, 1787, Hunt, ed., *Writings of Madison*, II, 336–40; King and Wilson, in Farrand, ed., *Records of the Federal Convention*, II, 7, I, 483.

oppressive. All political authorities had declared "that no extensive empire can be governed upon republican principles, and that such a government will degenerate to a despotism, unless it be made up of a confederacy of smaller states, each having the full powers of internal regulation." The reason was obvious. "In large states the same principles of legislation will not apply to all the parts." Different interests, different climates, different habits, would require different laws and regulations. For a single legislature to control the whole country it would be necessary to cramp and to mold groups of the population. The great empires thus had always been despotic. Tyranny would surely result "if we should submit to have the concerns of the whole empire managed by one legislature." When British theorists had suggested that Americans should be represented in Parliament, recalled the Antifederalists, "we uniformly declared that one legislature could not represent so many different interests for the purposes of legislation and taxation. This was the leading principle of the revolution," the Antifederalists concluded, "and makes an essential article in our creed."[12]

What gave substance to this Antifederalist claim that the proposed federal government would inevitably end in a consolidation was the conventional eighteenth-century theory of legislative sovereignty. The same logic that the English had used against the Americans in the late sixties and that most Americans had finally accepted in 1774–75 was now relentlessly thrown back at the Federalists by the opponents of the Constitution. There could be but one supreme legislative power in every state, the Antifederalists said over and over, and any proposition to the contrary was inconsistent with the best political science of the day. "I never heard of two supreme co-ordinate powers in one and the same country before," said William Grayson. "I cannot conceive how it can happen. It surpasses everything that I have read of concerning other governments, or that I can conceive by the utmost exertions of my faculties." The logic of the doctrine of sovereignty required either the state legislatures or the national Congress to predominate. Since, as the Pennsylvania Antifederalists argued,

12. Henry (Va.), in Elliot, ed., *Debates*, III, 44, 22; Adams to R. H. Lee, Dec. 3, 1787, Cushing, ed., *Writings of Samuel Adams*, IV. 324; Nasson (Mass.), in Elliot, ed., *Debates*, II, 134; [Lee], *Letters from the Federal Farmer*, Ford, ed., *Pamphlets*, 282; Lenior (N. C.), in Elliot, ed., *Debates*, IV, 202; [Winthrop], "Agrippa, IV," Dec. 3, 1787, Ford, ed., *Essays on the Constitution*, 64–65. See above, 499–500.

"two co-ordinate sovereignties would be a solecism in politics, . . . it would be contrary to the nature of things that both should exist together—one or the other would necessarily triumph in the fulness of dominion." It was impossible, wrote Robert Yates, that the "powers in the state constitution and those in the general government can exist and operate together." The Constitution, said Samuel Adams, established an "Imperia in Imperio justly deemed a solecism in Politicks." A "divided sovereignty"—"not knowing whether to obey the Congress or the State"—was a horrible absurdity to James Winthrop. "We shall find it impossible to please two masters." There could be no compromise: "It is either a federal or a consolidated government, there being no medium as to kind."[13] Like the disputants in the imperial debate of 1774–75, the Antifederalists could not conceive of "a sovereignty of power existing within a sovereign power." "These two concurrent powers cannot exist long together," warned George Mason; "the one will destroy the other." And the Antifederalists had no doubt that the federal government with its great sweeping power and its "supreme law of the land" authority "must eventually annihilate the independent sovereignties of the several states." How long, it was asked, would the people "retain their confidence for two thousand representatives who shall meet once in a year to make laws for regulating the height of your fences and the repairing of your roads?" Once the Constitution was established, "the state governments, without object or authority, will soon dwindle into insignificance, and be despised by the people themselves."[14]

It was a formidable position directly related to the Anglo-American debate that had led to the Revolution. When the Antifederalists asked, "How are two legislatures to coincide, with powers transcendent, supreme and omnipotent?" they were raising the fundamental issue on which the British empire had broken, an issue that the Federalists could no more avoid in 1787 than American Whigs could a decade and a half earlier. Although

13. Grayson (Va.), in Elliot, ed., *Debates*, III, 281; "Dissent of the Minority," Dec. 18, 1787, McMaster and Stone, eds., *Pennsylvania and the Federal Constitution*, 467–68; [Robert Yates], "Sidney, I," June 13, 1788, Ford, ed., *Essays on the Constitution*, 304; Adams to R. H. Lee, Dec. 3, 1787, Cushing, ed., *Writings of Samuel Adams*, IV, 324; [Winthrop], "Agrippa, V," Dec. 11, 1787, Ford, ed., *Essays on the Constitution*, 68; Phila. *Independent Gazetteer*, Apr. 15, 1788, in McMaster and Stone, eds., *Pennsylvania and the Federal Constitution*, 535.

14. E. Pierce (Mass.), and Mason (Va.), in Elliot, ed., *Debates*, II, 77, III, 29; Robert Whitehill, in McMaster and Stone, eds., *Pennsylvania and the Federal Constitution*, 284; Smith (N. Y.), in Elliot, ed., *Debates*, II, 312–13.

some Federalists shared the Antifederalist assumption that "two sovereignties can not co-exist within the same limits" and probably welcomed, as did Benjamin Rush, "the eventual annihilation of the state sovereignties," most soon realized that this problem of sovereignty was the most powerful obstacle to the acceptance of the new Constitution the opponents could have erected. Under this Antifederalist pressure most Federalists were compelled to concede that if the adoption of the Constitution would eventually destroy the states and produce a consolidation, then the "objection" was not only "of very great force" but indeed "insuperable." Both sides in the debate over the Constitution soon came to focus on this, "the principal question," "the source of the greatest objection, which can be made to its adoption"—"whether this system proposes a consolidation or a confederation of the states."[15]

The Federalists groped to explain the new system and to make sense of the "concurrent jurisdiction" of two legislatures over the same people. They stressed that the new government in many of its provisions was so "dependent on the constitution of the state legislatures for its existence" that it could never "swallow up its parts." Each state was only "giving up a portion of its sovereignty" in order "better to secure the remainder of it." Some talked of a dual allegiance, "two governments to which we shall owe obedience," while many others emphasized that "the sphere in which *the states* moved was of a different nature" from that of the federal government. "The two governments act in different manners, and for different purposes," said Edmund Pendleton in a common argument, "the general government in great national concerns, in which we are interested in common with other members of the Union; the state legislature in our mere local concerns. . . . They can no more clash than two parallel lines can meet." The truth was, said Madison, the Constitution was "not completely consolidated, nor is it entirely federal." It was "of a mixed nature," made up "of many coequal sovereignties."[16]

15. Grayson (Va.), in Elliot, ed., *Debates,* III, 281; Hamilton and Morris, in Farrand, ed., *Records of the Federal Convention,* I, 287, 34, 43; Rush, in McMaster and Stone, eds., *Pennsylvania and the Federal Constitution,* 300; Wilson in *ibid.,* 264; William Davie (N. C.), in Elliot, ed., *Debates,* IV, 58; Madison, in *ibid.,* III, 93–94; John Smilie, in McMaster and Stone, eds., *Pennsylvania and the Federal Constitution,* 267.

16. R. R. Livingston (N. Y.), Davie (N. C.), James Bowdoin (Mass.), James Iredell (N. C.), Livingston (N. Y.), Pendleton (Va.), Madison (Va.), in Elliot, ed., *Debates,* II, 385, IV, 160, 59, II, 129, IV, 35, II, 323, III, 301, 94, 381.

But none of these arguments about "joint jurisdictions" and "coequal sovereignties" convincingly refuted the Antifederalist doctrine of a supreme and indivisible sovereignty. The Federalists, like American Whigs in the late sixties, sought to refine, to evade, even to deny the doctrine, but it remained, as it had earlier, an imposing, scientific conception that could not be put down. It was left to James Wilson in the Pennsylvania Ratifying Convention to deal most effectively with the Antifederalist conception of sovereignty. More boldly and more fully than anyone else, Wilson developed the argument that would eventually become the basis of all Federalist thinking. He challenged the Antifederalists' use of the concept of sovereignty not by attempting to divide it or to deny it, but by doing what the Americans had done to the English in 1774, by turning it against its proponents.

"In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable. The only question," said Wilson, "is where that power is lodged?" Blackstone had placed it in the will of the legislature, in the omnipotence of the British Parliament. Some Americans, said Wilson, had tried to deposit this supreme power in their state governments. This was closer to the truth, continued Wilson, but not accurate; "for in truth, it remains and flourishes with the people." Those Antifederalists who argued that "there can not exist two independent sovereign taxing powers in the same community" had misplaced the sovereignty. The supreme power, Wilson emphasized, did not rest with the state governments. "It *resides* in the PEOPLE, as the fountain of government." "They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare." The sovereignty always stayed with the people-at-large; "they can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper." Unless the people were considered as vitally sovereign, declared Wilson with some exasperation, "we shall never be able to understand the principle on which this system was constructed." Only then would it be possible to comprehend how the people "may take from the subordinate governments powers with which they have hitherto trusted them, and place these powers in the general government. . . . They can distribute one portion of power to the more contracted circle called State governments; they can also furnish an-

other proportion to the government of the United States." Therefore under the new Constitution neither the state legislatures nor the Congress would be sovereign. "The power both of the general government, and the State governments, under this system, are acknowledged to be so many emanations of power from the people." The state legislatures could therefore never lose their sovereignty under the new Constitution, as the Antifederalists claimed, because they never possessed it. A consolidated government could never result unless the people desired one. For only the people-at-large could decide how much power their various governments should have. "Who will undertake to say as a state officer," taunted Wilson, "that the people may not give to the general government what powers and for what purposes they please? how comes it . . . that these State governments dictate to their superiors?—to the majesty of the people?"[17]

Although no Federalist grasped and wielded "this leading principle" of the Constitution with more authority than Wilson, others in the ratification debates were inevitably led to invoke the same principle. Faced with the Antifederalists' persistent references to consolidation and with their intense mistrust of Congress, the Federalists were repeatedly pressed to ask in exasperation: "But what is the sovereignty, and who is Congress?" In the Virginia Convention, Henry, for example, would not leave the issue of federal taxing power alone and continually denied the possibility of concurrent jurisdiction between the states and the national government. Without effect Madison argued that the tax collections between the general government and the states would be similar to those between the states and the various counties and petty corporations within their boundaries. "The comparison," retorted Henry, "will not stand examination." The taxes collected within the state, whether from the state, county, or parish level, all "radiate from the same center. They are not coequal or coextensive. There is no clashing of power between them. Each is limited to its own particular objects, and all subordinate to one supreme, controlling power—the legislature." All right, answered Madison. If there had to be one supreme, controlling power over the tax collections of the general and state governments, then one could be found. "To make use of the gentleman's own terms, the concurrent collections under the

17. Wilson and Findley, in McMaster and Stone eds., *Pennsylvania and the Federal Constitution*, 229, 301, 316, 301–02, 316, 317, 302, 389, 302.

authorities of the general government and state governments all radiate from the people at large. The people is their common superior."[18]

Relocating sovereignty in the people by making them "the fountain of all power" seemed to make sense of the entire system. Once the Federalists perceived "the great principle of the primary right of power in the people," they could scarcely restrain their enthusiasm in following out its implications. One insight seemed to lead to another, until the Federalists were tumbling over each other in their efforts to introduce the people into the federal government, which they had "hitherto been shut out of." "The people of the United States are now in the possession and exercise of their original rights," said Wilson, "and while this doctrine is known and operates, we shall have a cure for every disease."[19]

3. The Primal Power of the People

Even before the Philadelphia Convention met in the summer of 1787 some Federalists had perceived the political and constitutional importance of founding the new structure directly on the people rather than on the state governments. The very idea of calling a convention to change the Articles attested to the advantages of avoiding the states. As early as 1780 Hamilton had urged the calling of a national convention because the states individually could never agree on reform. By 1787 men who hitherto had shied away from such a convention because of the illegal proliferation of conventions within their own states in opposition to the state legislatures now saw that the authority of a convention would give the new system a stronger foundation than the Congress had possessed. Madison saw clearly that the new national government, if it were to be truly independent of the states, must obtain "not merely the assent of the Legislatures, but the ratification of the people themselves." Only "a higher sanction than the Legislative authority" could render the laws of the federal government "paramount to the acts of its members." If the Federalists were to accomplish their revolution, they would necessarily have to circumvent the Articles of Confederation whose amendment

18. Archibald Maclaine (N. C.), Henry (Va.), and Madison (Va.), in Elliot, ed., *Debates*, IV, 181, III, 306, 326–27, 332.

19. Pendleton (Va.), in Elliot, ed., *Debates*, III, 298; Wilson, in McMaster and Stone, eds., *Pennsylvania and the Federal Constitution*, 302, 341.